

Judge Asserts IBM Violated an Order

By Morton Mintz
Washington Post Staff Writer

A federal judge said yesterday that International Business Machines Corp. violated a court order and that its lawyers—"respected members of the bar"—had engaged in "unseemly behavior."

Chief U.S. District Judge David N. Edelstein in New York City made the charges in ruling that IBM had acted improperly in "procuring the destruction" of a computerized guide to company documents that formed the nucleus of a government anti-monopoly suit against IBM.

The ruling was an important victory for the Justice Department and its Antitrust Division, which had called IBM's "good faith" into question and had accused it of "complete defiance" of the order. Issued by Edelstein last March 16, the order directed IBM and the government to preserve "all documents . . . which relate in any way to electronic data processing . . ."

At the same time, the ruling was a direct rebuke to IBM and Cravath, Swaine & Moore, its prominent Wall Street law firm, which had accused the government of being "outrageous" in accusing it of "wrongdoing."

Indirectly, Edelstein repudiated the contention of a dozen of the nation's leading lawyers, including former federal Judges Simon H. Rifkind and Lawrence Walsh, that the destruction was, in IBM's words, "consistent with every principle of law and professional ethics."

The opinions of the lawyers had been solicited by Bruce Bromley, a partner in the Cravath firm who is a former judge of the New York State Court of Appeals.

In a hearing on the destruction on Feb. 14, Frederick A. O. Schwarz Jr. of the Cravath firm told Edelstein that none of his associates, including Bromley and IBM general counsel Nicholas deB. Katzenbach, a former U.S. Attorney General, would violate a court order knowingly. To do that would be "absolutely anathema and repugnant," Schwarz said.

Edelstein did not grant all of the relief requested by Antitrust Division trial attorney Raymond M. Carlson, who wanted IBM to be ordered to reconstruct the data base at a

Instead, the judge ordered IBM to provide promptly to him copies of any and all mate-

rials "needed or useful" for restoration of the computerized guide, which consisted of about 75,000 legal analyses—possibly 1 million pages—culled from 27 million to 40 million pages of IBM papers.

A company spokesman said that IBM, while "disappointed," "naturally will comply with what he has asked us to do."

The analyses were prepared by attorneys for Control Data Corp. (CDC) in preparation for trial of a private antitrust suit filed against IBM in December 1968. The government filed its civil anti-monopoly complaint, after a five-year investigation, on Jan. 17, 1969, the last business day of the Johnson administration.

The "unseemly behavior" protested by Judge Edelstein occurred two months ago, when the two computer firms agreed to settle the dispute with IBM paying CDC \$15 million.

With notice neither to Edelstein nor the government, IBM and CDC agreed that destruction of the computer base, on which the government relied in preparing for trial, would be a condition of settlement. The destruction began at 3 p.m. on Jan. 12, the day agreement was reached, and ended the next day, a Saturday. CDC told Justice's Carlson of it Sunday night.

In court papers and in argument on Feb. 13, Carlson charged that IBM "procured" the destruction—a word specifically protested as "inflammatory" by IBM's Bromley—in violation of "the letter and the spirit" of Edelstein's order.

Denying the charges, IBM counsel Schwarz said that swift, secretive destruction of the computerized guide was demanded because Cravath, Swaine & Moore, distrusting CDC's law firm, wanted to be sure IBM's former "enemy" would not "continue to supply an arsenal to the government."

The judge rejected as "without merit" IBM's claim that the destroyed materials were legally privileged lawyers' work product. Acting in a "hasty manner" without "sound reason," IBM's attorneys had denied him a chance to find out what the materials were, he said. This was "particularly disturbing because of the stature of the lawyers," he said.

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Court Says I.B.M. Violated Order in Destroying Data

By ROBERT J. COLE

A Federal court judge ruled here yesterday that the International Business Machines Corporation had violated a specific court order when it persuaded a competitor, the Control Data Corporation, to destroy a vast quantity of documents it had prepared for an antitrust suit against I.B.M.

Chief Judge David N. Edelstein, who issued the ruling in United States Court for the Southern District, said that I.B.M. had violated his sweeping order on last March 16 to preserve "all documents, writings, recordings, or other records of any kind whatsoever, which relate in any way to electronic data processing or to any electronic data processing product or service, until further order of this court."

Judge Edelstein said at the time: "I don't want a single document destroyed under any circumstances without the consent of this court."

Some Exemptions Asked

He noted that subsequently I.B.M. requested that certain materials be exempted from the order and, after discussion, the court ruled on each request.

The order developed as an outcome of the January, 1969, antitrust suit of the Department of Justice against I.B.M. Control Data, which has been engaged in a private antitrust suit against the company, was not a party to the order.

In fact, on Jan. 12, 1973, when the two computer makers settled their suit, each agreed to destroy the papers they had prepared for the mammoth case.

A key item was a computerized data base, or retrieval system, to help attorneys wade

through a mountain of material. The Department of Justice maintained that such a system was indispensable in preparing its case.

Judge Edelstein, rejecting an I.B.M. contention that Control Data was not bound by the order, said that if I.B.M., directly or indirectly, "procured" the destruction of the documents, I.B.M. could be held responsible.

He said he was convinced that I.B.M. procured the structure. "It was destroyed at the request of I.B.M., pursuant to an agreement between I.B.M. and I.D.C., and, therefore, I.B.M. can be held responsible for its destruction," he ruled.

The court ordered I.B.M. to provide promptly copies of "any or all" materials in its possession or control needed or useful in the reconstruction or restoration of the crucial data base.

It also ordered the company to produce immediately any elements of Control Data's base in its possession or control that it did not cause to be destroyed.

The judge refused, however, to order I.B.M., as the Government had requested, to pay the Justice Department for "all costs" in reconstructing the data base.

"Requiring I.B.M. to compensate the Government for the costs incurred in reconstructing a data base," Judge Edelstein said, "is tantamount to ordering its production."